IF A TREE FALLS IN QUEBEC, CAN ANYBODY SUE?

Supreme Court's newest decision on causation in automobile insurance contains surprise

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A new decision of the Supreme Court of Canada highlights a fundamental difference between purely no-fault automobile insurance jurisdictions like Quebec and fault-based automobile insurance jurisdictions like Alberta.

The facts of *Westmount (City) v. Rossy,* 2012 SCC 30 are very straight forward. In 2006 Gabriel Rossy was operating an automobile on the streets of the City of Westmount when a tree owned by the City fell on his vehicle, killing Mr. Rossy. The Plaintiffs, surviving family members, sued the City for its failure in properly maintaining the tree. The City moved to dismiss the action on the basis that the Plaintiffs' exclusive remedy was under Quebec's no-fault scheme in the *Automobile Insurance Act*. The Quebec Superior Court agreed with the City and dismissed the action. The Quebec Court of Appeal reversed that decision, reasoning that "the automobile is merely what he happened to be in when the tree fell. He could just as well have been walking, cycling, rollerblading, etc., and suffered the same injury."

On further appeal the Supreme Court of Canada reversed the Quebec Court of Appeal and reinstated the result from the Quebec Superior Court. Justice LeBel delivered the Court's unanimous judgment. The issue was whether Mr. Rossy's death resulted from an "accident" as defined in the Act. Applying that definition the Court had to determine whether his death was "*caused by an automobile, by the use thereof* or by the load carried in or on an automobile".

Justice LeBel began his analysis by reviewing the background and purpose of the *Act.* Quebec adopted a no-fault scheme in response to growing dissatisfaction with the system of civil liability for automobile accidents that existed in the 1970s. The Act's purpose is essentially "to ensure that victims of automobile accidents are compensated for their bodily injuries regardless of who is at fault." Justice LeBel noted that, arising from this purpose, under the Act the causal link between the injury and the automobile is *sui generis* (the only one of its kind) and therefore it is not helpful to refer to concepts of causation from the general law of civil liability.

Justice LeBel noted prior Quebec Court of Appeal jurisprudence that "the mere use of the vehicle, that is, its use, handling and operation, is sufficient for the *Act* to apply … that damage need not have been produced by the vehicle directly. It is enough that the damage occur in the general context of the use of the vehicle."

The Supreme Court's last decisions on causation in automobile insurance were the 2007 companion decisions in *Citadel General Assurance v. Vytlingam* and *Lumbermans Mutual Casualty v. Herbison*. Anyone familiar with those cases might be surprised that the Court found that Mr. Rossy's death was caused by an automobile. Justice LeBel summarized the rule from the *Vytlingam* case as requiring "an unbroken chain of causation linking the conduct of the motorist, as a motorist, to the injuries in respect of which the claim was made. The vehicle had to be implicated in those injuries in a manner that was more than merely incidental or fortuitous."

Justice LeBel distinguished the decision in *Vytlingam* in terms that strongly indicate a division between the law to be applied

in no-fault jurisdictions and the law to be applied in fault-based jurisdictions. The primary point of distinction was that *Vytlingam* did not deal with the kind of broad remedial legislation in force in Quebec.

Had the same accident occurred in Alberta or another fault-based province or territory Mr. Rossy's death would almost certainly not have been found to have been caused by the use or operation of an automobile. In *Herbison* and *Vytlingam* the Supreme Court was clear that the causal link had to be stronger than fortuitous or "but for". Subsequently the Alberta Court of Appeal has ruled that it is not sufficient to prove causation simply because the location of the accident was in an automobile (*ING Insurance Company of Canada v. Manuel*, 2008 ABCA 201).

In terms of its influence outside of Quebec, the *Rossy* decision is unlikely to have much effect in traditional fault-based jurisdictions like Alberta. However, Justice LeBel gave consideration to Manitoba Court of Appeal decisions and noted that Manitoba has a no-fault automobile insurance scheme that was modeled after the Quebec system and which uses statute wording very similar to Quebec's Act. One can reasonably expect that the *Rossy* case will have some importance as precedent in Manitoba.

In the coming months or years private automobile liability insurers may encounter Plaintiffs' counsel citing the *Rossy* case in claims where the causal link between the injury and the use or operation of the insured vehicle is questionable. We would remind insurers that in fault-based jurisdictions the governing test remains the "unbroken chain" set out in *Vytlingam* and *Herbison* and that the impact of *Rossy* is most likely restricted to no-fault jurisdictions.

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Michael clerked with the Supreme Court of British Columbia in Vancouver before articling with Field LLP's Calgary office. Following completion of his articles he became an associate with the firm in May 2000 and has worked in general civil litigation, insurance litigation and collections. He currently maintains a practice in legal research and writing with an emphasis on insurance coverage issues.

During his time with Field LLP Michael has prepared written submissions in cases before the Alberta Court of Queen's Bench, Alberta Court of Appeal, the British Columbia Supreme Court and various administrative tribunals in Alberta. He has extensive knowledge in civil procedure, insurance law, construction law and commercial litigation. He has written on construction surety and insurance, procedure and evidence and electronic discovery issues.

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